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No.

In The

SUPREME COURT OF THE UNITED STATES

Term, 1985

PARA TRANSIT CORPORATION, a Pennsylvania Corporation, and IRVING S. KARPE t/a YELLOW CAB COMPANY,

Petitioners

v.

COUNTY OF MONROE and MONROE COUNTY TRANSIT AUTHORITY, a Corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Is the property interest in Petitioners a property right protected by the Fifth and Fourteenth Amendments of the United States Constitution given further expression through Article I, Section 10 and Article X, Section 4 of the Constitution of Pennsylvania, the Pennsylvania Eminent Domain Code, 26 P.S., Section 1-502, and the Pennsylvania Municipal Authorities Act of 1945, 53 P.S. §306?

2. Is the Government permitted under the United States and Pennsylvania Constitutions to establish a service which duplicates, competes, takes and destroys, without redress, just compensation and due process, the property and rights therein of a person in possession of such rights?

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A person's property rights may not be taken or destroyed by government without just compensation.

Intangible business interests in a going concern is property for purposes of the constitutional protections.

The primary consideration is, "what has the owner lost, not what has the taker gained." Boston Chamber of Commerce v. Boston.

The rural nature of Monroe County, Pennsylvania distinguishes the instant case from other cases sounding in this area of law, in that the Governmental taking in this case is exceedingly more substantial than if the same Governmental actions were taken in a metropolitan area.

II. THE GOVERNMENTAL ACTIONS OF ESTABLISHING A TRANSPORTATION SERVICE WHICH DUPLICATES, COMPETES, TAKES AND DESTROYS, WITHOUT REDRESS, JUST COMPENSATION AND DUE PROCESS, THE PROPERTY AND RIGHTS THEREIN OF WHICH PETITIONERS WERE IN POSSESSION IS NOT PERMITTED UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS. . 38

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PARA TRANSIT CORPORATION, a Pennsylvania Corporation, and IRVING S. KARPE t/a YELLOW CAB COMPANY,

Petitioners

v.

COUNTY OF MONROE and MONROE COUNTY TRANSIT AUTHORITY, a Corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF PENNSYLVANIA

The Petitioners, Para Transit Corporation, and Irving S. Karpe t/a Yellow Cab Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania, the State Court of

last resort. Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on July 17, 1984. Petition for Reconsideration of Denial of Allowance of Appeal was denied by the Supreme Court of Pennsylvania on October 17, 1984.

OPINIONS BELOW

The Court of Common Pleas of Monroe County, Pennsylvania, rendered an Opinion and Final Order and Judgment on May 10, 1982, sustaining, with prejudice, Respondents' Preliminary Objections to Plaintiffs' Petition for Appointment of Board of View. Petitioners requested the appointment of viewers to assess the damages suffered as a result of violation by Respondents of the Municipal Authorities Act of 1945, Act of May 2, 1945, P.B. 382, as amended, 53 P.S., Section 301-322, and the ensuing

uncompensated de facto taking of Petitioners' transportation business by the County in violation of the Constitution of Pennsylvania, Article I, Section 8 and Article X, Section 4, the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. 1-101 through 1-903, and the United States Constitution, Fifth and Fourteenth Amendments. Following Petitioners' Appeal from the Common Pleas Court's Decision, the Commonwealth Court of Pennsylvania affirmed the lower Court on December 15, 1983. Para Transit Corp., et al. v. County of Monroe, et al., 79 Pa. Cmwlth. Ct. 104, 468 A. 2d 548 (1983). The Supreme Court of Pennsylvania denied Petition for Allowance of Appeal on July 17, 1984, and denied Petition for Reconsideration of Denial of Allowance of Appeal on October 17, 1984.

JURISDICTION

Pursuant to denial of Allowance of Appeal by the Supreme Court of Pennsylvania, the Decision of the Commonwealth Court of Pennsylvania became a "final judgment . . . rendered by the highest court of a State in which a decision could be had . . .," pursuant to the provisions of 28 U.S.C., Section 1257.

The jurisdiction of the Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

The Fifth Amendment of the United States Constitution provides in pertinent part:

". . . nor shall private property be taken for public use, without just compensation."

Article I, Section 10 of the Constitution of Pennsylvania provides in pertinent part:

". . . nor shall private property be taken or applied for public use, without authority of law and without just compensation being first made or secured."

Article X, Section 4 of the Constitution of Pennsylvania provides:

"Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements and compensation shall be paid or secured before the taking, injury or destruction."

STATEMENT OF THE CASE

The Petitioners, Para Transit Corporation and Irving S. Karpe, trading as Yellow Cab Company, had been the operators of PUC licensed public transportation companies serving rural Monroe County, Pennsylvania, since February 2, 1962. On or about October 5, 1979, Respondent, the Monroe County Transportation Authority ("Authority", "Government"), was established to operate a public transportation service in Monroe County, Pennsylvania. The Authority was created under the aforementioned Pennsylvania Municipal Authorities Act of 1945, 53 P.S., Section 306. The consequence of government action of establishing another transportation enterprise in Monroe County was the duplication of, and competition with, Petitioners' existing, privately owned, public transportation enterprise, and

constituted a taking of their property rights in violation of the aforesaid Act, the Constitution of Pennsylvania, the aforesaid Eminent Domain Code and the Constitution of the United States. By November, 1980, Authority had taken away most of Petitioners' ridership and implemented transportation for certain parts of Monroe County, all of which were covered by Petitioners' PUC rights.

Petitioners were substantially deprived of the beneficial use and employment of said business property rights and the rights granted them by the PUC. The Government is thus alleged to have impermissibly taken Petitioners' property for which just compensation must be paid.

By reason of the alleged de facto taking, Government has, in effect, exercised the power of eminent domain without making just compensation. Petitioners' Petition

for the Appointment of a Board of View sought to recover damages for the wrongful taking of their valuable business property and rights by Government. In May, 1981, Petitioners filed for bankruptcy, and, since approximately that time, have gone out of business. Another private enterprise, thereafter, obtained taxi cab rights and recently sought to establish a para transit service to which Authority has filed formal protest with the PUC on the basis that the new para transit service interferes with the Authority's transportation services. Curiously, the Authority in the instant case has asserted the opposite contention.

On May 3, 1982, Monroe County Court Judge Harold A. Thomson, Jr. sustained Government's Preliminary Objections on the basis that the services of Petitioners and Government served different purposes,

and "even if there is some overlap thereof, [the respective services] are not the same or substantially the same. There is need for both types of service, and we feel that we would be doing the public a grave disservice to hold to the contrary." (Appendix A)

On December 15, 1983, the Commonwealth Court of Pennsylvania affirmed the decision of the Common Pleas Court. In its Opinion, Judge Joseph T. Doyle held, despite the fact that Petitioners went out of business following the establishment of Government's transportation service, that the establishment of Government's service was consistent with the Pennsylvania Municipal Authorities Act and did not constitute a de facto taking of Petitioners' business. Para Transit Corp., et al. v. County of Monroe, et al., 79 Pa. Cmwlth.

Ct. 104, 468 A. 2d 548 (1983). (Appendix B)

On July 17, 1984 the Supreme Court of Pennsylvania entered its Order denying Petition for Allowance of Appeal. (Appendix C)

Petitioner filed an Application for Reconsideration of Denial of Allowance of Appeal on or about September 4, 1984 asserting that on or about August 27, 1984, the Authority announced the availability of door to door transportation service, which provision of said service constituted an extraordinary and intervening circumstance of substantial and controlling effect as basis for said Application for Reconsideration. Said Application for Reconsideration of Denial of Allowance of Appeal was denied by the Supreme Court of Pennsylvania on October 17, 1984. (Appendix D)

FEDERAL QUESTIONS PRESENTED

Constitutional questions in this litigation were first presented to the trial court in Petitioners' Petition for the Appointment of a Board of View seeking to recover damages for the wrongful taking of Petitioners' valuable business property and rights by Government under the Constitution of Pennsylvania, the Pennsylvania Eminent Domain Code and the Municipal Authorities Act of 1945. Petitioners, at that time, were deprived of any remedy for either taking or destruction of their property rights resulting from the establishment of Government's transportation service. Petitioners raised those issues of de facto taking of property rights without due process and just compensation in the Commonwealth Court of Pennsylvania claiming that Respondents were required to give

just compensation to Petitioners for the taking and destruction of Petitioners' business. The Court below denied this claim. (Appendix B)

Petitioners again raised those issues, upon constitutional grounds in the Supreme Court of Pennsylvania claiming that the Court below, the Commonwealth Court of Pennsylvania, failed to adequately consider constitutional aspects of Petitioners' claim in Petitioners' Petition for Allowance of Appeal. The Supreme Court of Pennsylvania denied Petitioners' Petition for Allowance of Appeal (Appendix C), and subsequently denied Petitioners' Petition for Reconsideration (Appendix D).

ARGUMENT

The state court of last resort has decided an important question of Federal Law which has not been to Petitioners' knowledge, but should be, settled by this Court, and has decided such question in a way in conflict with decisions of other state courts of last resort of cases sounding in similar or analogous circumstances to the case at bar.

As a result, Petitioners have been denied rights to "just compensation" for Government's de facto taking of their private property rights, as guaranteed by the Fifth Amendment of the United States Constitution, applied to the States through the Fourteenth Amendment, and as further guaranteed by the Constitution of Pennsylvania, Article I, Section 10 and Article X,

Section 4, the Pennsylvania Eminent Domain Code, and the Municipal Authorities Act of 1945, 53 P.S., Section 306.

The decision of the Court below (Commonwealth Court of Pennsylvania became the court of last resort of the state when the Supreme Court of Pennsylvania denied Allowance of Appeal), determines an important question of constitutional property law in conflict with all applicable decisions of the Supreme Court of the United States, pertaining to property rights, as guaranteed by the Fifth and Fourteenth Amendments, as well as decisions of various other state courts of last resort.

The basic issue is whether or not a person vested with property rights which are protected by the constitutional guarantees, is entitled to compensation when said property rights are taken or destroyed by government

action. The thrust of the decision of the Court below is that such a person in the possession of vested property rights is not entitled to just compensation for such property taken by government action.

Prior to the instant case, it has not been determined by any Court to Petitioners' knowledge that the owner of a business in a rural community which had supported said business for twenty (20) years is not entitled to compensation where an illegal taking has occurred of the business by the governmental establishment of a transportation service which, because of the small and rural nature of the community, directly competes and duplicates the services provided by the business thereby causing the taking and destruction of said business.

I. THE PROPERTY INTEREST IN PETITIONERS IS A PROPERTY RIGHT PROTECTED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 10 AND ARTICLE X, SECTION 4 OF THE CONSTITUTION OF PENNSYLVANIA, THE PENNSYLVANIA EMINENT DOMAIN CODE, 26 P.S. SECTION 1-502, AND THE PENNSYLVANIA MUNICIPAL AUTHORITIES ACT OF 1945, 53 P.S. SECTION 306.

It has been properly held that questions of whether a taking of a person's property rights by extra-judicial acts of public entities depends on the facts of each case. Hardesty v. State Roads Commission of the State Highway Administration, 276 Md. 25, 343 A. 2d 884 (1975).

This Court as well as other courts interpreting constitutional protections have consistently upheld the right of a property owner to be secure against invasion, taking or destruction of his property or property rights by such extra-judicial acts of public entities. Webb's

Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 66 L.Ed. 2d 358, 101 S. Ct. 446 (1980); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 67 L. Ed. 2d 551, 101 S. Ct. 1287 (1981). Further it has been recognized that intangible business interests in a going concern is property for purposes of the constitutional protections: In State by Mattson v. Saugen, 169 N.W. 2d 37 (1969), the issue on appeal was whether the going concern value of a liquor lounge, operating under a valid city liquor license, is property taken, destroyed, or damaged by the State's condemnation of the premises for which compensation should be given. The Supreme Court of Minnesota, reversing the lower court's holding that only the value of the real estate taken was compensable, cited Kimball Laundry Co. v. United States,

338 U.S. 1, 69 S. Ct. 1434 (1948), and Lane v. Hewgley, (Tex. Civ. App.) 155 S.W. 348, in holding that intangible business interests of a going concern is property for purposes of the constitutional protections. Specifically the Court in Mattson, quoting the Lane case, ennunciated:

" ' . . . this license or permission the citizen can hold against all the world but the state which conferred it. Such a right can hardly be said to be without value as a property interest. Lane v. Hewgley, supra at 350, '" Mattson at 169 N.W. 2d 40. Further the Mattson Court held that appellant's business had a going concern value which was destroyed by the condemnation insofar as the state's "taking" deprived appellant condemnee of his property and subsequently caused him to go out of the liquor business.

In Kimball Laundry v. United States, supra , the Supreme Court of the United States reversed the district court and held, "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going concern value of his business is a compensable 'taking' of property." Kimball, supra, 338 U.S. 1, 13, 69 S. Ct. 140, 141.

The holding in Kimball was followed by the judicial resolution of an epic in litigation: In Re: Fifth Avenue Coach-lines, Inc., 294 N.Y.S. 2d 502, 22 N.Y. 2d 613, 241 N.E. 2d 717 (1968), remittitur amended 300 N.Y.S. 2d 41, 24 N.Y. 2d 773, 247 N.E. 2d 861 (1969), appeal after remand 312 N.Y.S. 2d 592, 34 N.Y. A.D. 930 (1970), in which New York's highest Court awarded condemnee the value of its

going concern and numerous other intangible assets found by the Court to be compensable. See also Twin Cities Metropolitan Public Transit Area, etc. v. Twin City Lines, Inc., 301 Minn. 386, 224 N.W. 2d 121 (1974).

The question then becomes, "what has the owner lost, not what has the taker gained." Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 54 L. Ed. 725, 727, 30 S. Ct. 459 (1910). This approach, practically viewed as a mandatory perspective in determining whether a taking has occurred, has been followed in the later Supreme Court decisions of Kimball, supra , and United States v. General Motors Corp., 323 U.S. 373 (1945). It is this important consideration and perspective that the court of last resort below failed to take into account. The Commonwealth Court of Pennsylvania instead

found that the transportation system established by the Government did not take Petitioners' transportation business because the Government's system provided a different "classification" of service by virtue of "route and vehicle capacity" distinctions between the two services. The court said: "These three services [call or demand taxi service, para transit service, scheduled route service] filled distinct needs within the community. The route and vehicle capacity requirements protect each classification from destructively competing with another classification." (Appendix B, page 107) The perspective here is clearly on the gain of the taker rather than the loss of the owner. This is particularly true in view of the geographical-demographical context in which these services are

(and were) offered; that is, the rural, or, sparsely populated, provincial character of Monroe County, Pennsylvania, a Sixth Class County, where in fact the "distinct needs" filled by the three types of services argued by the Commonwealth Court are not distinct and actually collapse into one general need for transportation for a small community. Clearly, there is competition in such a case and a substantial taking of ridership which is very limited in scope, both in size and in geographical coverage. In essence, Petitioners contend that Monroe County is a "one-horse town" unable to support two transportation services.

Unfortunately, the Commonwealth Court allowed form to triumphover substance in its reasoning that the PUC regulations classifying types or methods of transportation

services "protect each classification from destructively competing with another classification." (Appendix B, page 107) We are not disputing the benefit or gain to the community, but only that a taking has in fact occurred to the owner's loss. If it were true as the Court appears to argue that each type of service is mutually exclusive of the other, and that for the purposes of the PUC regulations, do not compete with one another, then Petitioners' business would not have been at all affected, which is plainly contradictory to the hard facts.

In SEPTA v. Yellow Limosine Service, Inc., 10 Pa. Cmwlth. Ct., 572, 312 A. 2d 79 (1973), the Commonwealth Court grappled with similar issues found in the instant case. That case involved a protest by Yellow Limosine Service to

the extension (not the introduction or establishment), of SEPTA transportation services so as to include Philadelphia International Airport. The Commonwealth Court held such an extension of service did not violate the Metropolitan Authorities Act of 1963 for the purpose of granting a restraint in favor of the condemnee Yellow Limosine Service. The sharp and well reasoned dissent by Judge Kramer pointed out, however, the serious implications of what he considered

> "a seemingly never-ending extension of governmental proprietory interests through expansion of the theories evolving from the concept of the police powers, resulting in a constant depletion and erosion of the private citizen's constitutional rights."

SEPTA, supra, Dissenting Opinion, 10 Pa. Cmwlth. 572, 580. (Appendix E)

Judge Kramer went on to state:

> "To draw distinction between SEPTA's buses, taxicabs, limosines and automobiles is to stretch the elasticity of interpreting legislative intent to the breaking point, whereafter the

theory cannot be held together. To imply that SEPTA's proposed Airport bus service will not compete with Yellow Limosine follows the action of the proverbial ostrich. If Yellow Limosine's service is not adequate (which is certainly not proven in the record of this case, the City and SEPTA have an adequate remedy at law before the PUC."

Id. at 587. (Appendix E)

* * *

"If Yellow Limosine is put out of business, which is a very practical consideration in this case, it seems to me that the transportation system in Eastern Pennsylvania will be directly affected. It is because of these considerations that the Legislature intended SEPTA to be precluded from competing with PUC certificated public utility carriers."

Id. at 588. (Appendix E)

Justice Kramer concluded:

"Finally, the whole point of this dissent is that if SEPTA is permitted to institute this "experimental" airport bus service, and this new service will work to the detriment of Yellow Limosine as a competitor (which the record fully supports), then it not only violates Section 9 of the MTA, but in addition constitutes a taking of Yellow Limosine's property without compensation which, from this writer's

point of view, will be a blatant violation of both the State and Federal Constitutions. I would affirm the Order of the Court below, and if necessary, I would also reverse the lower court on its finding that SEPTA had proven a need for the additional service."

Id. at 588 [emphasis supplied]. (Appendix E)

In the instant case to argue that an individual who formerly used Plaintiffs' taxi service to go from his home to some destination and back now uses the Government's transportation system to do so, does not provide and fulfill the same purpose and need of that individual, is to elevate a mere formalized glance at the instant situation above substantive analysis of the circumstances and consequences of introducing a bus service with extensive routes in a County which can, and has managed to, support but one transportation service in the County's history.

Although the holding in SEPTA, supra ,

may at first appear to be dispositive of the present action, there are several important aspects of that case which sharply distinguish the majority holding therein from the instant case. In addition to the important and correct points presented in the dissent, SEPTA was adjudicated entirely in the posture of injunctive relief being sought as the sole remedy. The heavier burden of showing exigency and necessity for a restraining order as well as the higher level of scrutiny needed in deciding upon an equitable remedy such as a restraint puts that case in a completely different judicial posture from that presented in the instant case where the remedy being sought is just compensation. Petitioners in the instant case merely seek to be justly compensated for the valuable property interests that were taken

by the Government actions in establishing a transportation service where Petitioners' already existed. Judge Kramer in his Dissenting Opinion in SEPTA gave proper credence and support to the private property rights versus unconstitutional governmental taking of those rights. (Appendix E)

Second, an equally important consideration which distinguishes the SEPTA situation from that of the instant case is the respective localities involved. SEPTA involved a large metropolitan area, namely Philadelphia, which is well able to support numerous transportation service enterprises and can continue to support them despite the expansion of SEPTA Municipal Services. The instant case involves a rural county of the sixth class which has been able to satisfy its

demand for transportation services by way of Petitioners' business for twenty years. Finding as did the lower court that the establishment of the Government's transit service did not have a profoundly greater competitive and condemning impact on Petitioners' business in Monroe County than that sustained by Yellow Limosine's greater metropolitan business in the SEPTA case, is to sacrifice substantive factual analysis for an inflexible and myopic application of principles.

The constitutional protections of private property aforesaid have, in Pennsylvania, been given further expression and effect in the Constitution of Pennsylvania, Pennsylvania Eminent Domain Code and the Municipal Authorities Act of 1945, hereinafter referred to as the "Act", which provides as follows at 53 P.S. 306:

* * *

> "The purpose and intent of this act being to benefit the people of the Commonwealth, by, among other things, increasing their commerce, health, safety and prosperity, and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, none of the powers granted by this improvement, maintenance, extension or operation of any project or projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes . . ."

The intent of the Pennsylvania Legislature in enacting this piece of legislation was to prctect the people of this Commonwealth from undue governmental interference by preventing a governmental unit from establishing its own enterprises that would "duplicate or compete with existing private or public enterprises serving substantially the same purposes," without paying just compensation therefor. [Emphasis supplied]. Id.

It is clear that the language of the

Act conditions governmental action so as to restrict the establishment of governmental enterprises which serve substantially the same purposes as those already in existence. [Emphasis supplied]. Id. This language in effect prohibits not only the establishment of enterprises which serve exactly the same purposes of existing enterprises, but it also prohibits those governmental enterprises which serve substantially the same purposes. Clearly, the Act was aimed at preventing governmental competition with and taking of ongoing private enterprises accomplishing substantially the same purposes without the payment first of just compensation. The framers of this legislation obviously endeavored to create a prohibition designed to prevent the Government from usurping vested and existing rights and interests of the private enter-

prise sector without paying for them.

In Thompson Appeal, 427 Pa. 1 (1967), Justice Roberts analyzed the instant Municipal Authorities Act clause in question stating:

> ". . . the anti-competitive proviso appears in the same paragraph and, in our view, the deliberate omission of the power to acquire and hold property shows a clear legislative design that the proviso was not to be a restriction upon the authority's right to condemn. As we read the proviso relied upon by appellants its primary purpose is to protect businesses which will be competing with the condemnor's operations, because any loss of business resulting from such competition is not compensable under the Eminent Domain Code. Where, as here, appellants will not be competing with the municipal airport and will have received full compensation for the taking the proviso's raison d'etre disappears . . ."

Id. at 3-4.

The Supreme Court's conclusion, therefore, is that the legislature, by this Act, simply extended the area of compensable takings to include business loss due to duplication and/or competition similar to the instant case. Petitioners do not question Government's right to

establish its transportation service under the Act and constitutional protections, but simply seek compliance with the requirements thereunder relating to just compensation.

The instant case concerns public transportation in rural Monroe County where the population and area served is small compared to the city. Whether one is discussing para transit, taxicab service, or mass transit, all of these rest on substantially the same subject; all of these serve substantially the same purpose: public transportation. The services in question accomplish the same purpose and are thus the same in kind. It is the method that differs, not the purpose. Petitioners accomplished the public transportation purpose for which they were licensed by providing a "call" or "demand" transportation service. This

traditional demand method used by Petitioners fulfilled the public transportation needs over a twenty (20) year period that saw little population growth by providing transit vehicles which offered personalized accommodation and afforded great flexibility as to destinations and time schedules. The Government now accomplished the same public transportation service that Petitioners did previously by providing transit vehicles of greater size and seating capacity (although the size and capacity are not fully utilized), which travel to scheduled destinations at scheduled times over the same areas Petitioners serviced. If it were true that each of the types of service discussed by the Commonwealth Court are non-competitive and mutually exclusive of the other, then Petitioners' business would not have been

taken or destroyed as it in fact has.

The destinations and times provided by the Government's service duplicate and coincide completely with those available through Petitioners' service. The Government's service provides no exclusive or additional destinations or scheduled runs not already provided by Petitioners' service. The two services in question are thus completely coincident and competitive. There was never an instance when the Government provided a service that was not already provided by the Petitioners.

As a result Petitioners were forced out of business by the positive effects of Governmental competition and duplication of public transportation services in the instant case. The policy of legislation thoughtfully put into force by the Commonwealth of Pennsylvania supersedes the free,

unchecked interference and competition by a governmental unit with an existing enterprise, serving substantially the same purpose without payment of just compensation as provided by the Pennsylvania Eminent Domain Code, the United States Constitution and the Constitution of Pennsylvania. The nonpayment for and governmental taking of Petitioners' business is precisely what has occurred in the instant case. Petitioner respectfully submits that it has shown that Government provided transportation for the same people to the same destinations at the same timesas Petitioners' service had for the preceding twenty (20) years. The sole purpose of each respective service was furnishing public transportation from Monroe County. The two methods utilized by the respective parties

differed in quality rather than in kind, and effectuated substantially identical purposes and results. Therefore, the Government's action of establishing the Monroe County Transportation Authority and subsequently introducing a transportation service for Monroe County, did in fact duplicate, compete with and take Petitioners' previously established and then existing enterprise, violating the Municipal Authorities Act of 1945, the Pennsylvania Eminent Domain Code, the United States Constitution and the Constitution of Pennsylvania, thereby injuring Petitioners when they received no compensation for the taking of their business property.

II. THE GOVERNMENTAL ACTIONS OF ESTABLISHING A TRANSPORTATION SERVICE WHICH DUPLICATES, COMPETES, TAKES AND DESTROYS, WITHOUT REDRESS, JUST COMPENSATION AND DUE PROCESS, THE PROPERTY AND RIGHTS THEREIN OF WHICH PETITIONERS WERE IN POSSESSION IS NOT PERMITTED UNDER THE UNITED STATES AND PENNSYLVANIA CONSTITUTIONS.

The Pennsylvania Eminent Domain Code, 26 P.S. 1-502(e) giving further expression to the constitutional protections of private property against governmental taking or destruction without compensation, provides for an owner of property to petition for viewers to secure damages where a compensable injury has been sustained and no declaration of taking has been filed -- the "de facto" taking case. The case of In re Condemnation of 14 E. Maple Street, New Castle, 26 Pa. Cmwlth Ct. 387, 363 A. 2d 856, 858 (1976), set out the elements of a "de facto" taking case. The court stated:

> "As to whether or not there has to be a 'de facto' taking, it has been previously held that where an entity, clothed with the power of the eminent domain, exercises that power and the immediate, necessary and unavoidable consequences of that exercise is to destroy, injure or damage private property so as to substantially deprive an owner of the beneficial use or enjoyment thereof, an 'inverse condemnation' or 'de facto' taking of said property has occurred and just compensation must be paid."

Article X, Section 4 of the Constitution of Pennsylvania which mirrors the Fifth Amendment of the United States Constitution, provides:

> "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury or destruction."

Petitioners' injury in effect amounted to a "taking" by the Government for which just compensation must be paid. It has

been properly recognized that constitutional protection of private property from governmental condemnation without just compensation includes intangible assets and rights as well as realty and other tangible property interests.

Cases have recognized that physical appropriation of land is not the only circumstance upon which a taking can be based. In U.S. v. Brooklyn Union Gas Company, 168 F. 2d 391 (2nd Circuit, 1948), the Court held that the taking of a public franchise is a taking of property, for which compensation must be paid. The Pennsylvania Supreme Court in Griggs v. Allegheny Co., 402 Pa. 411 (1961) in which the "taking" was the interference with the use and enjoyment of Plaintiff's land adjacent to the Pittsburgh Airport by flights of aircraft at low altitudes through the airspace above the land,

stated a "taking" occurred "when the entity clothed with the power of Eminent Domain substantially deprives an owner of the beneficial use and enjoyment of his property. Miller v. Beaver Falls, 368 Pa. 189, 196-197, 82 A. 2d 34; Creasy v. Stevens, 160 F. Supp. 404, 410-412. "Griggs, supra., at 414.

The case of Alco Parking v. City of Pittsburgh, 453 Pa. 245, 307 A. 2d 851 (1973), is particularly relevant to cases dealing with governmental units competing with private enterprise, cases such as the instant case. In Alco, a municipality levied a gross receipts tax upon private parking lot owners while itself operating a public parking authority which was in direct competition with the private sector. The court stated that it was the tax coupled with the Authority's acts of

operating in competition with the private sector which tipped the balance and amounted to a taking for which just compensation must be paid. The Court stated at 269:

> "This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional constitutional problem of what constitutes a taking without due process but also an impermissible one."

In Alco, supra, Justice Roberts quotes in a footnote from Haseqawa v. Main Pineapple Co., 52 Haw. 327, 425 P. 2d 679 (1970), wherein the Supreme Court of Hawaii stated:

> "'In this case money, instead of realty, is being taken for a public use. However, we see no difference between the taking of money to pay public employees and the taking of realty to house government institutions. In both instances, the State is seeking to enhance the economic value of a government enterprise at the direct expense of a particular individual or group. This is precisely the kind of government "taking" which requires just compensation.' Id. 52 Haw. at 334, 475 P. 2d at 684 (footnote omitted) [Emphasis supplied in original]."

453 Pa. at 268, 307 A. 2d at 864, n. 14.

Petitioners respectfully suggest that the same reasoning and holdings of Alco and of Haseqawa apply to the instant action. Petitioners believe that the Government is precluded from operating the duplicating and competitive transit system in question without paying Petitioners' damages for injury to their property caused by such operation. See SEPTA, supra, Dissenting Opinion (Appendix E).

The Court below relies primarily on the distinction that Petitioners operated a para transit service as opposed to a mass transportation service over a fixed route as provided by Government. Petitioners maintain that this is a technical distinction at best which upon closer analysis reveals merely a distinction in form, not substance. It is crucial to realize that

it is the Government's taking (without compensation) of property interest and passengers from Petitioners' business with the purpose, identical with Petitioners', of accommodating their transportation needs, and not the technique or method of doing so, that constitutes the unlawful duplication, competition and condemnation proscribed by the Municipal Authorities Act of 1945, Article I, Section 10 and Article X, Section 4 of the Constitution of Pennsylvania, and the Fifth and Fourteenth Amendments of the United States Constitution. The Court in Alco, supra , seemed to anticipate the dangerous lure of form over substance reasoning when it stated:

> "Moreover, in determining what is a 'taking' this Court may not allow form to prevail over substance. As the Supreme Court noted, 'The substance and not the shadow determines the validity of the exercise of the power.' Stewart Dry Goods Co. v. Lewis, supra, at 555, 55 S. Ct. at 527."

Petitioner asserts that while it may be technically and practically possible to draw a distinction between para transit and mass transit in a large metropolitan area such as Philadelphia, allowing the distinction to apply in a rural county such as Monroe County would be to allow form to prevail over substance. In the instant case, both transportation systems use the same routes, both service the same persons, and each operates in direct competition with the other. While there may be a different name or form applied to these respective systems, the substance (held in common) of the services provided has but one name -- transportation. Petitioners respectfully request that form be prevented from prevailing over substance in the instant case.

In Takings and the Police Power, 74 Yale L.J. 36 (1964), a test was posited by

the author, Professor Sax, for determining when compensation is due private property owners as a result of governmental activity. Professor Sax discusses at length the historical and practical problems involved with the various approaches to the taking question, including the widely adopted diminution-in-value theory. Professor Sax asserts that government interacts with the private sector in two ways. First, government "mediates the disputes of various citizens and groups within society". Id. at 62. Secondly, government acts as an enterprise when it acquires economic resources for its own account and thus enters into competition with private industry. Professor Sax states:

> ". . . when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is

> constitutionally required; it is that result which is to be characterized as a taking."

Id. at 63.

More specifically, Professor Sax enumerates:

> ". . . when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required."

Id. at 67.

The Government was clearly acting in an enterprise capacity when it established a county-wide transit system. By such actions Government acquired economic resources in the form of user fees and ridership which directly competed with and took from Petitioners' private enterprise. The acquisition of these resources enhanced Government's resource position directly at Petitioners' expense. It must be

recognized that Petitioners had worked long and hard to establish, build and sustain their transportation business for twenty (20) years. They had been innovative and progressive in the services that they offered. Through these deligent efforts, Petitioners' business legally acquired substantial economic worth which was materially reduced as a direct result of Government's actions. Petitioners realized that Government in no way took physical possession of their property, but assert that such a physical appropriation is not necessary to constitute a taking. Professor Sax states:

> "To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this [Professor Sax's] theory. But -- and this is the most important point -- the presence or absence of a formal title acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterprise, is

acquiring resources for its own account."

74 Yale L.J. 36 at 67.

In another relevant article, The Consequences of Taking Property by Regulation, 24 Practical Lawyer 65 (April, 1978), Professor Kanner propounds the trend taken by a growing number of courts of granting just compensation for takings perpetrated by governmental units despite the validity of their actions. Professor Kanner writes:

> "The judicial response has generally denied specific relief on the theory that even if the governmental activity in question worked a taking, the owner is not entitled to stop or invalidate the governmental act. Rather, his remedy is provided by the Constitution in the form of just compensation in an inverse condemnation proceeding."

Id. at 75, [Emphasis supplied.]

The Government's acts of establishing, operating and maintaining a transportation system within the same small rural locale and over the same routes previously

serviced by Petitioners amounted to direct competition and resulted in the taking of valuable property for which just compensation must be paid.

CONCLUSION

It is respectfully suggested that, for all of the foregoing reasons, a writ of certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania, the court below.

Respectfully submitted,

DAVID E. ROBBINS, Esq.
Counsel for Petitioners

David E. Robbins, Esq.
2000 Richard Drive
Broomall, Pennsylvania 19008
(215) 891-4043

APPENDIX

APPENDIX A

IN THE COURT OF COMMON PLEAS OF THE
43RD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA
MONROE COUNTY BRANCH -CIVIL ACTION

PARA TRANSIT CORPORATION, a Pennsylvania Corporation and IRVING S. KARPE, t/a YELLOW CAB COMPANY,	:	No. 914 Civil 1981
Plaintiffs	:	
-vs-	:	
COUNTY OF MONROE and MONROE COUNTY TRANSIT AUTHORITY, a Corporation,	:	
Defendants	:	

OPINION

Plaintiff, Para Transit Corporation and Plaintiff, Irving S. Karpe, t/a Yellow Cab Co. petitioned the Court for the appointment of a Board of View pursuant to the Pennsylvania Eminent Domain Code, 26 P.S. 502(e), alleging a de facto taking of their property by Defendant Authority and Defendant Monroe

County, who have filed Preliminary Objections to same, which are now before us for resolution.

Under the aforecited Eminent Domain Code, 26 P.S. 1-502(e), a property owner may petition the Court for appointment of a Board of View to award damages where there has been a compensible [sic], injury sustained, and no Declaration of Taking filed. Such an action is known as a "de facto taking" or "inverse condemnation". Our Commonwealth Court has said: "...it has been previously held that where an entity, clothed with the power of eminent domain, exercises that power and the immediate, necessary and unavoidable consequence of that exercise is to destroy, injure or damage private property so as to substantially deprive an owner of the beneficial use and enjoyment thereof, an

'inverse condemnation' or 'de facto' taking of said property has occurred and just compensation must be paid." In re: Condemnation of 14 East Maple Street, New Castle, 26 Pa. Comm. 387 (1976).

Plaintiffs argue that Defendant Authority, in establishing a transportation system within the County of Monroe and as authorized by the said County has so acted by duplicating and competing with Plaintiffs' business, causing Plaintiffs irrepairable [sic] and compensible [sic] injury. We feel it is necessary to examine the nature of both Plaintiffs' service [sic] and that provided by Defendant Authority to rule on this argument.

Plaintiff, Para-Transit Corporation operates a service under a PUC license. Under this authority, it may furnish trans-

portation between points of Monroe and Pike County and within an airline distance of 25 miles of the boundaries of the said counties to points in Pennsylvania utilizing vehicles with seating capacities of not more than 7 or less than 15 persons, and for which advance reservations have been made in vehicles not reserved for individual use. Under Plaintiff, Yellow Cab's PUC license, it is empowered to operate a call or demand service" in Pennsylvania and vice-versa if call for such service is received in the area authorized by the certificate. On the other hand, Defendant Authority was created under the Pennsylvania Municipal Authorities Act of 1945, 53 P.S. 301 et. seq. to operate a scheduled route service over designated routes between 6 terminal points.

A similar, if not identical, situation was argued in SEPTA v. Yellow Limousine Service, Inc., 10 Comm. Ct. 572 (1973). Therein, Yellow Limousine sought to restrain Septa from instituting bus service from Philadelphia International Airport to Center City Philadelphia. The Commonwealth Court in reversing the Court of Common Pleas, held that the operation of mass transportation scheduled route service does not constitute unlawful competition with a call service operating over the same route.

The statutory authority in question in the aforesaid case was contained in Section 9 of the Metropolitan Transportation Authority Act of 1963, 66 P.S. 2001, et. seq. The said statute provides:

> "... None of the powers granted by this act shall be exercised in the construction, improvement, maintenance, extension or

> operation of any projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes."

Plaintiffs herein argued that the language of the statute in question, 53 P.S. 306 is more restrictive. We do not agree. That statute reads, in relevant part, as follows:

> "....." none of the powers granted by this act shall be exercised in the construction, improvement, maintenance, extension or operation of any projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purpose."

We believe the key phrase in both statutes falls at the very end thereof, "serving substantially the same purposes." Just as the Commonwealth Court found in the SEPTA case, Supra, we find that a fixed route service such as that of Defendant Authority and the type of services provided by Plaintiffs simply do not

"serve substantially the same purposes."

Plaintiffs would differentiate between the instant situation and the SEPTA case because of the differences between the Monroe County area and Metropolitan Philadelphia. We cannot make our decision on this basis. Even in this area the purpose to be served by the different services even if there is some overlap thereof are not the same or substantially the same. There is a need for both types of service, and we feel that we would be doing the public a grave disservice to hold to the contrary.

As we see no practical chance that the Plaintiffs would be able to amend their Petition so that our holding would differ, we would sustain the Preliminary Objections heretofore filed with prejudice, so that

immediate recourse may be had to our Appellate Courts for such review of our ruling as may be desired.

We having made our ruling on this basis, it is not necessary that we reach the procedural and other issues set forth in the objections, and hence we will issue the following:

O R D E R

AND NOW, this 3rd day of May, 1982, the Preliminary Objections of Defendants herein are sustained with prejudiced [sic], and Plaintiffs' petition is dismissed.

BY THE COURT,

Harold A. Thomson, Jr.
J.

IN THE COURT OF COMMON PLEAS
OF THE FORTY-THIRD JUDICIAL DISTRICT
MONROE COUNTY BRANCH
CIVIL ACTION
NO. 914 CIVIL 1981

PARA TRANSIT CORPORATION,
a Pennsylvania Corporation
and IRVING S. KARPE t/a
YELLOW CAB COMPANY,

PLAINTIFFS

VS.

COUNTY OF MONROE and MONROE
COUNTY TRANSIT AUTHORITY, a
Corporation,

DEFENDANTS

: : : : : : : : : : : : : : : : : : : :

ORDER

AND NOW, this 10th day of May, 1982, upon motion of Edwin Krawitz, Esq., Attorney for Plaintiff, the Court directs that a final Order and Judgment shall be entered in the captioned matter.

By the Court,

HAROLD A. THOMSON,JR.

Para Transit Corporation, etc. et al., Appellants *v.* County of Monroe et al., Appellees.

Eminent domain—Transportation—Scheduled route service system—Authority— Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382—Taxicab—De facto taking.

1. The establishment of a new scheduled route service system by a municipal authority is consistent with the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, and does not constitute a de facto taking of the business profits of a call or demand taxicab service. [106]

Argued June 6, 1983, before President Judge Crumlish, Jr. and Judges Doyle and Barbieri, sitting as a panel of three.

Appeal, No. 24 T.D. 1982, from the Order of the Court of Common Pleas of Monroe County in the case of Para Transit Corporation, a Pennsylvania Corporation and Irving S. Karpe, t/a Yellow Cab Company v. County of Monroe and Monroe County Transit Authority, a corporation, No. 914 Civil, 1981.

Petition to the Court of Common Pleas of Monroe County for appointment of a board of viewers. Preliminary objections filed. Preliminary objections sustained and petition dismissed. Thomson Jr., J. Complainants appealed to the Superior Court of Pennsylvania. Case transferred to the Commonwealth Court of Pennsylvania. Held: Affirmed.

Edwin Krawitz, for appellants.

BEST AVA

Peter F. Cianci, with him *John W. Dry*, for appellees.

OPINION BY JUDGE DOYLE, December 15, 1983:

This is an appeal from a decision made by the Court of Common Pleas of Monroe County which sustained Monroe County's (County) preliminary objections to a petition for the appointment of viewers made by appellants, Para Transit Corporation and Irving S. Karpe (Karpe). Karpe requested the appointment of viewers to assess the damage he suffered as a result of an alleged violation of the Municipal Authorities Act (Act)[1] and the ensuing uncompensated de facto taking of the business profits of Karpe by the County in violation of the Eminent Domain Code.[2]

Karpe operated a call or demand taxicab service and a paratransit service in Monroe County. On October 5, 1979, the Monroe County Transportation Authority (Authority) was established to operate a scheduled route service system in Monroe County, Pennsylvania. The Authority was created under the auspices of the aforementioned Act. Karpe petitioned for the appointment of viewers alleging that as a consequence of the creation of the scheduled route service his business was destroyed. He alleged violation of the Act and of the Eminent Domain Code stating that by establishing the new transportation system, the County competed directly with his enterprise and, in effect, took his business profits without any compensation. The Court of Common Pleas of Monroe County sustained the County's preliminary objections stating that there was no violation of the Act because

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[1] Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. §301-322.

[2] Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§1-101 through 1-903.

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of the differences in the nature of the services which Karpe and the County provide.

Section 2 of the Municipal Authorities Act states, in pertinent part:

> The purpose and intent of this act being to benefit the people of the Commonwealth, by, among other things, increasing their commerce, health, safety and prosperity and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, none of the powers granted by this act shall be exercised in the construction, improvement, maintenance, extension or operation of any project or projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes.

53 P.S. §306A. The issue thus presented is whether the services provided for by the County do in fact duplicate or compete with the enterprises of Karpe. If the services provided by the County's new scheduled route service are distinct, there is no violation of the Municipal Authorities Act and no de facto taking of Karpe's property.

The most important factors which distinguish the different types of services are the seating capacity of the vehicles and the route schedules. The different and varying types of service are encompassed in regulations promulgated under the Act. Scheduled route vehicles, *i.e.*, buses, are not permitted to deviate from a designated route without specific authorization.[3] Scheduled route service vehicles must have a seating capacity of at least six persons, excluding the driver.[4]

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[3] 52 Pa. Code §29.302(b).

[4] 52 Pa. Code §29.304.

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Call or demand taxi service may only operate vehicles which seat no more than eight passengers, excluding the driver[5] and are prohibited from interfering with scheduled route service,[6] but may travel anywhere within their authorized territory.[7] Paratransit service vehicles, on the other hand, provide transportation for groups of less than fifteen passengers, excluding the driver,[8] and may not provide services filled by either call or demand taxis, or scheduled route services.[9] These three services fill distinct needs within the community. The route and vehicle capacity requirements protect each classificatioon from destructively competing with another classification.

In a case similar to the case at bar, *SEPTA v. Yellow Limousine Service, Inc.*, 10 Pa. Commonwealth Ct. 572, 312 A.2d 79 (1973), a limousine and call or demand service company protested the extension of SEPTA's scheduled route service into an area where the company's cabs and limousines were operating. We stated that this did not constitute unfair competition, reasoning that a paratransit and taxicab service do not serve substantially the same purpose as a mass transit system operating on scheduled routes. *Id.*

Each service is different and fills a different need in the community. As such they cannot be said to serve substantially the same purpose. The establishment of a new scheduled route service is consistent with the Municipal Authority Act and does not constitute a de facto taking of Karpe's business profit.

Because we have concluded that there has been no taking, it is not necessary for our purposes to decide

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[5] 52 Pa. Code §29.314(a).
[6] 52 Pa. Code §29.312(2).
[7] 52 Pa. Code §29.312(5).
[8] 52 Pa. Code §29.354(a).
[9] 52 Pa. Code §29.353(2).

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whether the property discussed herein could constitute the type of property interest compensable under the Pennsylvania Eminent Domain Code.

The decision of the Court of Common Pleas sustaining the preliminary objections to the petition for the appointment of viewers was without error and is, therefore, affirmed.

ORDER

Now, December 15, 1983, the order of the Court of Common Pleas of Monroe County in the above referenced matter, dated May 10, 1982, is hereby affirmed.

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APPENDIX C

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT
468 City Hall
PHILADELPHIA, PA 19107
(215) 496-4600

July 20, 1984

Edwin Krawitz, Esq.
401 Prospect Street
East Stroudsburg, Pa. 18301

Re: Para Transit Corp. a Pa. Corp., and Irving S. Karpe, t/a Yellow Co. Co., Pet. v. County of Monroe and Monroe County Transit Authoritz, [sic], a Corp,- Respondents
No. 40 E D ALLOC. DKT. 1984

Dear Mr. Krawitz:

This is to advise you that on July 17, 1984 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,
Marlene F. Lachman, Esq.
Prothonotary

Patrick Tassos,
Deputy Prothonotary

PT:jpa
cc: Peter F. Cianci, Esq.

APPENDIX D

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT
468 City Hall
PHILADELPHIA, PA 19107
(215) 496-4600

October 22, 1984

Edwin Krawitz, Esq.
401 Prospect Street
East Stroudsburg, PA 18301

Re: Para Transit Corporation, etc., Petitioners v. County of Monroe and Monroe County Transit, etc., Respondents
No. 40 E.D. Allocatur Docket 1984

Dear Mr. Krawitz:

This is to advise you that the following Orders have been endorsed on the following Petitions, which have been filed in the above-captioned matters:

October 17, 1984
Petition for Stay of Remand:
Petition denied.
By the Court: Nix, Chief Justice

October 17, 1984
Application for Reconsideration
Application denied.
By the Court: Nix, Chief Justice

Very truly yours,
Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos,
Deputy Prothonotary

APPENDIX E

DISSENTING OPINION
BY JUDGE KRAMER
IN

SEPTA V. YELLOW LIMOSINE SERVICE, INC., 10 Pa. Cmwlth. Ct. 572, 580 (1973)

DISSENTING OPINION BY JUDGE KRAMER:

I respectfully dissent. In yet another case, this Court is confronted with issues brought about by the heavy hand of an awesomely powerful governmental body seeking to utilize its specifically delineated legislative power to improve its proprietary-governmental business through competitive services, while enjoying tax and other operating advantages to the detriment of its private industry competitor, in what I believe is an unconstitutional manner. From a purely philosophical-political point of view, we have witnessed in cases before this Court a seemingly never-ending extension of governmental proprietary interests through expansion of the theories evolving from the concept of the police powers, resulting in a constant depletion and erosion of the private citizen's constitutional rights.

This writer must confess that to any person who has experienced the incongruous situation of having flown across the State in much less time than it takes the airport limousine service to get from the airport to Center City, Philadelphia, and for those of us who have waited in inclement weather for the arrival of airport transportation, and thereafter to be jammed like sardines into an unclean and uncomfortable vehicle, there is a temptation from the practical side of things to conclude that additional service, any kind of service, may be needed or desirable; but personal emotional feelings

cannot be permitted to control the outcome of any lawsuit.

As this writer pointed out in *City of Philadelphia v. SEPTA*, 1 Pa. Commonwealth Ct. 101, 271 A. 2d 504 (1970), SEPTA, as an authority, is a separate body corporate and politic, and although it is not entirely governmental, it is also not entirely private. It is an independent agency of the Commonwealth, rather than a creature, agent or representative of the municipality organizing it. As the lower court pointed out in this case: "The Legislature did not intend to pit this public enterprise [SEPTA] against a private enterprise in a contest for the same business trade or customers. The Authority [SEPTA] with its tax-free operation, subsidies and grants from Federal, State and Local governmental bodies is in a position to unfairly compete with private business. We must bear in mind that private enterprise, unlike the Authority [SEPTA], must depend solely upon the fare box for its revenue."

At this point, it is indeed appropriate to point out that our Supreme Court in the case of *Alco Parking Corporation v. City of Pittsburgh*, 453 Pa. 245, 307 A. 2d 851 (1973), has taken a giant step in recognizing the current problem of governmental agencies competing with private enterprise. In that case, the municipality levied what was determined to be a confiscatory tax upon private parking operators. The Court pointed out that the municipality was competing with these private businessmen through a public parking authority, and that the combination of tax exemptions, lower interest afforded public financing and other benefits derived through the Authority approach to governmental proprietary interest, combined with the levying of a tax presented the Authority an "extraordinary competitive advantage." It stated: "This governmental enterprise competing with private industry adds not only a new and most significant dimension to the traditional con-

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stitutional problem of what constitutes a taking without due process but also an impermissible one." 453 Pa. at 269, 307 A. 2d at 864. It went further in stating: "This is admittedly a case of first impression in this Commonwealth. Traditionally governmental activities held to be unconstitutional takings of property without due process of law are restricted, for example, to the realm of zoning and eminent domain. However, no reason has been suggested why unconstitutional takings must necessarily be restricted only to this segment of the law. Indeed, this Court has held that 'a "taking" is not limited to an actual physical possession or seizure of the property; if the *effect* of the zoning law or regulation is to deprive a property owner of the lawful use of his property it amounts to a "taking," for which he must be justly compensated:' Cleaver v. Board of Adjustment, 414 Pa. 367, 372, 200 A. 2d 408, 412 (1964) and cases cited therein.

"Moreover, in determining what is a taking this Court may not allow form to prevail over substance. As the Supreme Court noted. 'The substance and not the shadow determines the validity of the exercise of the power.' Stewart Dry Goods Co. v. Lewis, supra, 294 U.S. at 555, 55 S. Ct. at 527." (Emphasis in original). 453 Pa. at 269, 307 A. 2d at 864. In *Alco, supra,* Justice ROBERTS quotes in a footnote from *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 475 P. 2d 679 (1970), wherein the Supreme Court of Hawaii stated: "' In this case money, instead of realty, is being taken for a public use. However, we see no difference between the taking of money to pay public employees and the taking of realty to house government institutions. *In both instances, the State is seeking to enhance the economic value of a government enterprise at the direct expense of a particular individual or group. This is precisely the kind of government "taking" which requires just compensation.*' Id. at 334, 475

P. 2d at 684 (footnote omitted) (emphasis added)." 453 Pa. at 268, 307 A. 2d at 864, n. 14.

This writer suggests that the reasoning and holding of *Alco* applies with equal force to this case.

On the merits, the court below was absolutely correct, from this writer's point of view, in holding that SEPTA was precluded from initiating the proposed airport express bus service under the provisions of Section 9 of the Metropolitan Transportation Authorities Act of 1963 (MTA), Act of August 14, 1963, P. L. 984, 66 P.S. §2009, which states: "The authority shall not have the right to use any street or public way presently occupied by a public utility engaged in local passenger transportation, for a competing purpose, without the agreement of such public utility." After a very careful reading of the record in this case, I can come to no other conclusion but that the proposed SEPTA service will be in direct competition with the Yellow Limousine Service, a public utility. SEPTA would have us twist the descriptions of the vehicles used by Yellow Limousine so that they could be designated "taxicabs," thereby coming within the expressed exemption of Section 3(8) of MTA, 66 P.S. §2003(8). Only the delusions of an ardent advocate could twist the record in this case to such an extent that airport "limousines" are "taxicabs." The mere fact that the Pennsylvania Public Utility Commission (PUC) distinguishes between limousine service and taxicab service, as is evidenced by the distinction in the certificates issued to the Yellow Limousine Service Company and the Yellow Taxicab Company, should be sufficient to draw a legal distinction.

The majority would have us believe that because Yellow Limousine charges $1.75, as compared with the proposed $1.00 charge of SEPTA, that SEPTA will service a different kind of customer and therefore, there is no competition. My reading of the record discloses

that the main witness (Perdan) for SEPTA stated twice in the record that the service will be competitive. The record also clearly shows that if SEPTA's proposed service is put into effect, the Yellow Limousine service will be drastically affected.

The Legislature clearly set forth in MTA that if SEPTA desires to compete with any transportation public utility, it must either obtain that utility's agreement, or proceed to attempt condemnation. Therefore, with regard to the question of statutory authority in SEPTA to inaugurate the service proposed, I would affirm the court below.

In addition thereto, however, the court below held that SEPTA had proven a "need" for this service. My review of the record leads me to believe that the court below erred in this regard. There is not one word of testimony by any witness showing that the service of Yellow Limousine is inadequate. I believe that the lower court has misinterpreted the word "need" as found in the statute. Section 4(d)(28) of MTA, 66 P.S. §2004(d)(28) permits SEPTA to extend service "into areas which have sufficient need for them to economically or strategically justify such extension." This must be read in conjunction with Section 9, mentioned above.

The only showing of need which SEPTA made in this case was its *belief* that it was economically feasible for it to enter into this new venture. That SEPTA requested only that this airport bus service be offered on an "experimental" basis is proof of this fact. In other words, if the proposed operation is not economically feasible, only then would SEPTA say there is not a need.

I suggest that this approach to the word "need" is improper. The need is the public need, not the need of SEPTA. While I recognize that the economic feasibility to SEPTA has some bearing on whether SEPTA

should extend its service, economic feasibility should not necessarily control the determination of "need." If further proof of SEPTA's stilted position were required, I should point out that whereas Yellow Limousine has for many years offered services seven days a week, 24 hours a day with regular scheduled routes between 6:00 A.M. and 11:00 P.M., SEPTA proposes on an "experimental" basis to offer service only from 7:00 A.M. through 9:30 P.M. This assumes that Yellow Limousine would be willing to offer service between 9:30 P.M. and 7:30 A.M., when the record indicates that almost all of such profitable airport service is rendered between the hours SEPTA has chosen to take for itself.

SEPTA also alludes to a two-month labor dispute between Yellow Cab and Yellow Limousine and their drivers' union which they set forth as a basis for a showing of need. This labor dispute may be the reason that SEPTA proposed this new airport service at this time, but the labor dispute should not be used as the basis for the showing of need. SEPTA's drivers also may some day be on strike, and it is not hard to imagine the argument which SEPTA would raise if some citizen, or some transportation company, attempted to use that proposition in order to take over some portion of SEPTA's transportation system. In summary, my review of the record permits me to conclude that SEPTA never showed a need for the service it proposed.

SEPTA also makes much over its argument that there can be no competition without a "common class of customers." SEPTA argues that it will be the poorer, or more economy-minded, airline passengers who will utilize SEPTA's service, whereas the wealthier class of customers will continue to use Yellow Limousine. This is a makeshift argument for the record also discloses that it is the economy-minded airline passenger who takes the limousine service rather than the more

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expensive taxicab. There is absolutely nothing in this record upon which SEPTA can base this assertion except the self-serving declarations of its own witnesses. It should be noted first that in the recommendations of the Hearing Examiner, SEPTA's fare structure was subject to complete change following studies made during the "experimental period." At this point in time, no one knows whether or not SEPTA will be able to offer this service at less than what Yellow Limousine charges. Next, I believe I can take judicial notice of the fact that it is more expensive to travel across this Commonwealth by plane than by train or bus. It seems reasonable to conclude that anyone who can pay the additional money to travel by plane can afford to take the limousine.

The public would be the big loser under the SEPTA plan. It seems reasonable to assume that many of the people utilizing the airport are traveling to Philadelphia. Many of them will be housed in hotels or motels in Philadelphia. The record indicates that under the SEPTA plan, its buses would not stop in front of hotels or motels, and therefore, the traveling public could be forced to carry its bags as far as two blocks.

The City of Philadelphia filed a brief in this case as *amicus curiae* in support of SEPTA's position. Once again from a practical standpoint, the City's brief is persuasive. It speaks of the air pollution problem caused by so many private automobiles being driven to the airport, and argues on evidence, dehors the record, of the bad financial condition of Yellow Limousine and its inability to keep pace with the increase in air passenger statistics. Under the law, as I view it, the City has an avenue open to it if it desires to prove its assertions in a proper legal fashion. It may file a complaint with the PUC. The fact that it has not filed such a complaint seems to support an argument contrary to the City's position, i.e., that the City must be

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satisfied with the airport limousine service it now has. Furthermore, according to the City's brief, it controls the airport facilities. Accepting this assertion as true, cannot the City control the use of private automobiles transporting people to its airport through control of its parking lots? If the City's airport parking charges for automobiles were in excess of the Yellow Limousine charge, would not the City to some extent limit the use of private automobiles? As a user of Philadelphia's airport, it is the observation of this writer that the City has aided and abetted in the creation of the problem about which it now complains for the private automobile parking lots at Philadelphia Airport have been expanded to mammoth proportions in recent years.

By filing this dissent, I do not mean to imply that SEPTA could not improve the existing service. The record indicates that SEPTA has for many years operated three bus routes to points near the airport, i.e., routes U, M and 37. Clearly, it could have more buses per day, or larger or more comfortable or more desirable buses, along these routes. What I am saying, however, is that Section 9 of MTA, 66 P.S. §2009, is a legislative declaration that without the agreement of the duly certified PUC common carrier affected, SEPTA may not inaugurate and develop a new service in direct competition with said carrier. To draw the distinction between SEPTA's buses, taxicabs, limousines and automobiles is to stretch the elasticity of interpreting legislative intent to the breaking point, whereafter the theory cannot be held together. To imply that SEPTA's proposed airport bus service will not compete with Yellow Limousine follows the action of the proverbial ostrich. If Yellow Limousine's service is not adequate (which is certainly not proven in the record of this case), the City and SEPTA have an adequate remedy at law before the PUC.

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During the 12-month period ending June 30, 1969, Yellow Limousine transported 368,952 passengers between the airport and Center City, Philadelphia. This service was provided through 27 limousines, known as "stretch outs" or "Airport mini-buses," and utilized the services of 44 full-time employes with a payroll of $408,303.00 in 1968. There is not one word in this record that Yellow Limousine has not fulfilled the public's need. Yellow Limousine is a duly certificated PUC public utility carrier specifically licensed to carry out the service proposed by SEPTA.

If Yellow Limousine is put out of business, which is a very practical consideration in this case, it seems to me that the transportation system in Eastern Pennsylvania will be directly affected. It is because of these considerations that the Legislature intended SEPTA to be precluded from competing with PUC certificated public utility carriers. Certainly the Department of Transportation and the PUC have jurisdictional interests which surpass and take precedence over the desires of SEPTA's Board to enter into a new transportation venture (if economically feasible) in competition with another carrier licensed by the State.

Finally, the whole point of this dissent is that if SEPTA is permitted to institute this "experimental" airport bus service, and this new service will work to the detriment of Yellow Limousine as a competitor (which the record fully supports), then it not only violates Section 9 of the MTA, but in addition constitutes a taking of Yellow Limousine's property without compensation which, from this writer's point of view, will be a blatant violation of both the State and Federal Constitutions. I would affirm the Order of the court below, and if necessary, I would also reverse the lower court on its finding that SEPTA had proven a need for the additional service.

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